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Supreme Court, U.S.

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No. _____

In The

Supreme Court Of The United States

October Term, 1997

JEROME BERG,

Petitioner,

vs.

STATE BAR OF CALIFORNIA

Respondent

On Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is due process violated where no constitutional court (not even the state supreme court) provides a trial or plenary appeal review before a law license is revoked?

2. Is the due process right to a full and fair opportunity to litigate denied when the licensee is not permitted any defense on a disbarment-level charge and is given only a single hour of trial time to prove a highly-detailed "mitigation" to that charge?

3. Are due process and equal protection denied when on every issue existing rules, practices, statutes, and precedents favorable to petitioner are ignored or reversed with no explanation of why so much law must be disregarded?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Jerome Berg respectfully petitions for a writ of certiorari to review his disbarment order from the Supreme Court of California.

OPINIONS BELOW

Appended are the unpublished March 25, 1998 disbarment order of the Supreme Court of California (App. 1) its April 22, 1998 denial of petition for rehearing (App. 3); and, the decision of the Review Department of the California State Bar Court. (App. 4)

JURISDICTIONAL STATEMENT

The California Supreme Court entered its disbarment order without an opinion on March 25, 1998 (App. 1) and denied rehearing April 22, 1998 (App. 2a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (a). The federal issues upon which the court's jurisdiction is invoked were raised and discussed in briefs to the state supreme court and in

the California State Bar Court and Review Department.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution as applied by the Fourteenth Amendment imposes due process requirements on state acts to take property or liberty interests. The right to practice ones profession is a "liberty" right within the amendment's protection. Green v McElroy 360 U.S. 474, 492 [79 S.Ct. 1400, 1411] (1959) citing Schware v Bd. Of Bar Examiners 352 U.S. 232 [77 S.Ct. 752] (1957).

Under the Equal Protection Clause of the United States Constitution rules must be applied "with an even hand." Rinaldi v Yeager 384 U.S. 305, 310-311 [86 S.Ct. 1497, 1501] (1966). ". . . [t]hose similarly situated [must] not be treated differently unless the disparity is justified." Harper v Virginia Bd. of Elections 383 U.S. 663, 665 [86 S.Ct. 1079, 1080] (1996).

Article 1 §10 of the United States Constitution forbids legislative impairment of contracts.

California Civil Code § 2860 (App. 47) entitles an

insured to unconflicted independent counsel if "a *possible* conflict *may arise* . . . ." (Emphasis added.)

SUMMARY STATEMENT OF PROCEEDINGS BELOW AND RELATED MATTER

Petitioner was licensed to practice law in California in 1959. California Business & Professions Code § 6125 requires that an attorney practicing in California be a member of the State Bar. The California State Bar Court (not a constitutional court under California law) recommended his disbarment. (App. 45) The State Bar Court gave preclusive effect to a fraud judgment in a civil case brought against petitioner by TDIC (a third party payer insurance company) over legal fees. Therefore, petitioner was not allowed to defend as to the facts supporting Count One in the State Bar proceeding. The State Bar Court made no examination as to: 1) whether the issues raised as to Count One were identical to those in the civil case or, 2) whether petitioner's written offer of proof demonstrates the result in the civil case was unjust. *Rest. Judgments 2d* § 29 (App. 17).

The California Supreme Court ordered his disbarment early in 1998 (App. 1) without according petitioner a plenary review[1] and without an opinion on the issues. As a case brought by another lawyer raising the issue[2] that there is a right to plenary review in law license revocation cases is still pending, (App. 1) petitioner has a right to reconsideration if Mr. Rose is granted relief. (App. 1) A motion for rehearing was denied April 22, 1998. (App. 3) This timely petition is filed within 90 days thereof.

Petitioner requests judicial notice of his return to this court's disbarment Rule to Show Cause in D-1958, which reviews the factual background.

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1 Under California law plenary review includes oral argument and a decision "with grounds stated" (see Cal. Const. Art. VI, § 14 and People v Medina (1972) 6 Cal. 3d 484, 488-93 [99 Cal. Rptr. 630]).

2 In re Rose on Discipline California Supreme Court No. S062859. (See App. 50.)

STATEMENT OF THE CASE AND REASONS FOR GRANTING THE PETITION

A. Petitioner Cannot Obtain Due Process Below

1. No California Constitutional Court Presently Reviews Disbarments

Since 1991 the California Supreme Court has not performed the evaluation and adjudication function while disbarring lawyers.[3] It has delegated that responsibility entirely to an administrative "State Bar Court"[4] established by statute. As a matter of policy there is no judicial review of their findings in a constitutional court. Although this procedure appears to violate the State Constitution (Strumsky v San Diego County, etc. (1974) 11 Cal. 2d 28, 42 [112 Cal.Rptr.805, 814]), the California Supreme Court has refused to modify it.

2. No Independent Judiciary Tries Licensure Cases

This disbarment procedure does not provide licensees

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3 The constitutional court must make the ultimate decision. See U.S. v Raddatz 447 U.S. 667, 683 [100 S.Ct. 2406, 2416] (1980).

4 Cal. Const. Art. VI identifies the state's courts of record. The State Bar Court is not on the list.

with due process. The California State Bar Court is staffed by administrative judges who lack independence. See California Business & Professions Code § 6079.1(a). About three years ago five of the eight California State Bar judges (including the presiding judge of the Review Department) whose original six year terms expired were not re-appointed without explanation. The *Los Angeles Daily Journal* October 10, 1996 pages 10 and 11, called that change of the court's membership "the Fourth of July massacre." New judges were appointed.

This purge made a dramatic difference in petitioner's case. Petitioner asked for review of the civil trial under *Rest Judgments 2d* § 29 for unfairness before preclusion was imposed. This was a proper request under previous California State Bar Court practice. See In the Matter of Applicant A (State Bar Review Dept. 1995) 3 Cal. St. Bar Ct. Rptr. 318,324,329)

The judge originally assigned made a pre-trial ruling that petitioner was entitled to a trial on all of the issues in Count One. (App. 51) However, she was not reappointed, and a newly-appointed judge vacated her ruling, stating, "I'm not

going to rule on whether you had a fair trial." (See App. 25, 42.)

3. Lack Of A Full And Fair Opportunity To Litigate

Petitioner was denied a full and fair opportunity to litigate his defense and retain his license. (App. 9)

The State Bar Court denied petitioner the right to contest the disbarment charge (Count One) in the case-in-chief by giving preclusive effect to the civil fraud judgment. Petitioner opposed preclusion with a verified 44 page detailed declaration indexed to the record in the civil case demonstrated its unfairness. The civil jury never saw evidence of two-and-a-half years of necessary work in defense of TDIC's insureds because the civil trial court ruled that based on a new statute (California Civil Code § 2860) petitioner was not entitled to be paid for work after TDIC's letter to him saying they no longer intended to provide independent counsel, therefore, evidence of his work after that date could not be introduced for any purpose. (See App. 14, 19.)

Even if trial in the underlying civil case had been fair,

petitioner should not have been precluded from offering in the State Bar case evidence of his work which had been withheld from the civil jury because the elements of a licensure case "the propriety of his billing" (App. 16, 17, 19)) are different from the contract and fraud issues in the civil case, because (among other reasons) absence of justified reliance or lack of damages deprive a civil fraud case of a necessary elements. Those considerations are not a complete defense to "improper" billing for disciplinary purposes. *Rest. Judgments 2d* § 27

The State Bar Court allowed petitioner to present his evidence of two-and-a-half years of work (on over 40 cases plus other work), as mitigation of Count One only. (This shifted the burden of proof whether the work billed for had been done from the State Bar to petitioner.) However, even this mitigation was limited to a single hour, an obviously inadequate time. (App. 25)

4. Equal Protection of the Laws Was Denied

The State Bar judges without explaination refused to follow a dozen established rules, statutes, judicial precedent,

and policies which provided some due process.

Although the normal burden of proof on mitigation is "preponderance of the evidence." (California State Bar Rules of Procedure, Rule 214 and California Evidence Code § 115), petitioner was required to establish mitigation by "clear and convincing" evidence (App. 39). See Maltaman v State Bar (1987) 43 Cal. 3d 924, 931 [239 Cal. Rptr. 687, 689] which resolves doubt in the attorney's favor.

B. Federal Law Was Violated

Absence of an opinion the California Supreme Court makes review here difficult. See Koningberg v State Bar of California 353 U.S. 252, 287 [77 S.Ct. 722, 734] (1957). In refusing plenary review the California Supreme Court denied petitioner a fair opportunity to have his federal issues determined in a manner which would not frustrate federal judicial review. See the dissent of Brennan, J., in McGuthra v California (1970) 402 U.S. 183, 268 [91 S.Ct. 1454, 1498] and Boykin v Alabama 395 U.S. 238, 244 [98 S.Ct. 1709, 1712] (1968) regarding the due process right to a record "adequate for

any review . . . ." But Appendices 1 and 50 articulate the non-review due process issue.

C. Without Notice, In 1991 The State Supreme Court Unconstitutionally Stopped Giving Law Licensee Revocation Cases Plenary Review

Until 1991 the California Supreme Court provided plenary review to all recommendations of the State Bar discipline system, but the published series of disbarment case which received plenary review ended with Calvert v State Bar of California 54 Cal. 3d 765 [1 Cal. Rptr. 2d 684; 819 Pac. 2d 424] (1991). Since 1991 Californians have been disbared without the right to a constitutional court's written "decisions that determine causes . . ." with reasons stated "as required by Article VI §14 of the California Constitution.

At the end of 1997 in Rose on Discipline (App. 50) the California Supreme Court first publicly acknowledged that it has a "no review" policy, and it now seeks to address whether it should change its policy. The language of the Rose Order to Show Cause is cryptic (App. 50), but if it is read together with

petitioner's disbarment order (App. 1) it is obvious there is a non-review policy.

In an effort to bring that policy of non-review to this court's attention petitioner's counsel wrote to the California Supreme Court asking for a statement of the non-review policy. (App. 55) No meaningful reply was given (App. 58), despite a specific reference that a clerk of the California Supreme Court told counsel that no such written no-review policy statement exists. (App. 56)

D. Delegation Of Judicial Authority is Unconstitutional

In Northern Pipeline Contr. Co. v Marathon Pipe Line Co. 458 U.S. 50 [102 S.Ct. 2858, 73 L.Ed. 2d 598] (1982) this court held that the federal bankruptcy court system established by the Bankruptcy Reform Act of 1978 was constitutionally inadequate because judges in that system were not granted the independence assured to constitutional judges under Article III of the Constitution. California law (which has been ignored for the past 7 years) forbids destruction of a vested license by a "non-judicial body". Laesne v California Board of Optometry

(1942) 19 Cal.2d 831, 834-5, 841 [123 P.2d 457] and see Suckow v Board of Medical Examiners (1920) 182 Cal. 247 [187 P. 965]. Temporary suspension without a final *"adjudication"* in a constitutional court is an unconstitutional deprivation. Conway v State Bar (1989) 47 Cal.3d 1107, 1132 [255 Cal.Rptr. 390, 407] and see Matter of Kenney (1987) 399 Mass. 431 [504 N.E. 2d 652, 656]

E. No Right To Defend The Case-In-Chief; One Hour For Mitigation Defense

In the State Bar Court petitioner was not allowed a defense in the case-in-chief on Count One (the disbarment-level offense);[5] he was allowed "mitigation" time to show that the claimant in Count One suffered no damages, but that mitigation time was limited to one hour. (App. 24, 25)

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5 Count One concerns a legal fee dispute between petitioner and The Dentists Insurance Company (TDIC) for whose insureds petitioner defended over 40 dental malpractice/intentional tort cases, hundreds of pre-litigation claims, two professional organization dissolution cases, and two licensure-type administrative cases. About half of that work was excluded from evidence in the civil "fraud" case. Is it any wonder the jury thought petitioner collected money for little or no work?

The State Bar judge knew his order restricting petitioner's obviously lengthy mitigation evidence to a single hour violated due process, so when he was challenged for bias (for this and other reasons including half a dozen hurtful "findings" not supported by evidence) he crafted a written statement to another State Bar judge who was assigned to review the bias allegation. In that statement he asserted that the one hour limit was only "suggested." However, the March 19,1996 State Bar Court trial transcript shows Judge Brott enforced the hour time limit, breaking into a recess to interject:

> I'm not going to stop you but I just want to tell you that you've got, what, another half hour or so....

The unfairness of the one hour limit on his defense/mitigation was apparent from petitioner's objective mitigation evidence of two-and-a-half years of which was excluded from the civil case. That work was outlined before the State Bar trial in a 26 page single-spaced chronology (App. 24) referring to 1,500 pages of exhibits which include bills and reports of other lawyers which refer to petitioner's work;

testimony of one dentist's office manager/wife about hours of phone calls every week discussing the 20 cases against her husband and the various legal and factual issues which demonstrate petitioner's knowledge of the facts, law and procedure; some documents created by petitioner and his staff; and finally his own unrefuted testimony which in only an hour could not reasonably discuss the 26 page outline of his work. The court did not find that uncontradicted, unimpeached mitigation evidence "clear and convincing," (App. 14)[6] but if it were a defense in the case-in-chief even this truncated rebuttal was adequate to refute an unconscionable fee claim on which the State Bar would have the clear and convincing burden of proof ("Rule 214, California State Bar Rules) because it shows TDIC got its money's worth and suffered no damages.

F. The California Disbarment Is Error Because Due Process Assures The Right To A Defense

A law license is protected by due process requirements

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6 The correct standard is "preponderance of the evidence." See page 9 above.

in the manner of a quasi-criminal case including an "opportunity...for explanation and defense" and an "opportunity to be heard." In Re Ruffalo (1968) 390 U.S. 544, 550 [88 S.Ct. 1222, 1226].

In Schware v Board of Bar Examiners (*supra*) 238; 77 S.Ct. 756 this court held that the state

> cannot exclude a person from the practice of law *in a manner* or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment (Emphasis added.)

Petitioner has documented that fair procedures were denied to him in a dozen rulings on legal issues and more than half a dozen unsupported fact "findings,"[7] but under the present

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7 In his petition to the California Supreme Court he synopsized the worst components of equal protection and due process denial beginning with his summary suspension from practice in a second trial upon the order of the State Bar judge who recommended his disbarment in the first trial – a situation condemned in Gagnon v Sarpelli (1973) 411 U.S. 779, 785-6; 93 S.Ct.1756, 1761 because having decided that the license should be revoked that judge is "no longer possessed of an impartial mind" when the second trial began. Petitioner's challenge against that judge hearing the summary suspension procedure was denied in an earlier single line non-review order of the California Supreme Court. Among other procedural wrongs about which he petitioned are the preclusive use of the unfair fraud judgment and the limitation to only one hour of his "mitigation" (the only way

system no state remedy in a constitutional judicial forum is open to his request for a hearing. See Hudson v Palmer (1984) 468 U.S. 534 [104 S.Ct. 3194, 3204].

Hovey v Elliott 167 U.S. 409, 413-14 [17 S.Ct. 841] (1897) holds

> The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have an inherent power to deny all right to defend an action and to render decrees without any hearing whatever is in the very nature of things to convert the court exercising such

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he was allowed to introduce evidence which should have been allowed as defense to the State Bar's case-in-chief where the "clear and convincing" burden of proof is on the prosecutor). The State Bar judge then ruled mitigation must be proved by "clear and convincing" evidence contrary to the State Bar Rules, Rule 214, California Evidence Code § 115 and Maltaman. That flip flop of the burden of proof stacked the deck against petitioner, while forbidding all but an hour of defense pre-determined disaster for petitioner on the mitigation leg of the case especially because the judge who limited petitioner's right to put on a defense was going to be the "impartial" adjudicator of its probity. Petitions to the California Supreme Court also protested the wholesale abandonment of published rules, statutes, State Bar precedent, and California Supreme Court precedent including vacating the rule in Edmondson v State Bar (1981) 29 Cal.2d 339, 343 [172 Cal.Rptr. 899, 901] that unimpeached testimony of the licensee can't be "arbitrarily disregarded" and re-writing the attorney/client relationship to establish a *fiduciary* duty to a third party fee payer among other new rules of law at odds with the former California rules and decisions across the country on similar issues.

authority into an instrument of wrong and oppression, and hence to strip it of the attribute of justice upon which the exercise of judicial power necessarily depends.

G. Collateral Estoppel Should Not Be Allowed as to the Old Fraud Judgment Because Parties, Probative Facts, And Issues Are Different

Rest. Judgments 2d § 27 provides criteria for collateral estoppel. Briefly, identity of parties and issues are fundamental to imposition of preclusion.

There are profound issue differences between the imposition of a money judgment in a civil case and the components public protection in a license revocation case.

STATEMENT OF THE FACTS

A. Detailed Procedural History

Petitioner was charged in a three count State Bar disciplinary notice to show cause. Count two is a minor charge regarding a trust fund violation which if fully established would not call for a disbarment discipline. Petitioner prevailed on Count Three.

The case which could justify disbarment (Count One) accuses petitioner of "charging or collecting an unconscionable fee." Count One is based on a detailed "special verdict" in a California civil case in which petitioner was found to have committed fraud on The Dentists Insurance Company (TDIC) which was a third party payer for petitioner's services as "independent counsel" to three of that company's insureds. Petitioner contends that judgment should not be given preclusive effect because it was obtained unfairly (as described below).

Petitioner and TDIC had no agreement about billing. Petitioner originally billed by task on an hourly basis. Later he billed in advance on the anticipated volume of work as projected upon the quantity of pleadings he received.[8] Some days he received over 24 hours of work because numerous ten-ream boxes of papers (each holding 5,000 pages) were delivered to him and logged -- into the billing system. (App. 11) The

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8 Comparable pay based on the volume of the record is given to defense attorneys appointed in death case appeals by the California Supreme Court. See its fee schedule at 93 DAR 16220-16225 and see Ashmus v Calderon 123 F.3d 1199, 1207-8 (9th Cir. 1997).

advance bills are conspicuously different from the former itemized task billing because they say nothing about what work was done. (App. 11) TDIC's claims officers who received the bills never telephoned or otherwise inquired about the advance bills or petitioner's increasing the hourly rate (App. 10) despite the fact that reviewing attorney fee bills and paying claims is their only professional function.

After petitioner was paid, the California Legislature enacted a new statute (California Civil Code Section 2860, App. 8) which was amenable to the interpretation that independent counsel need not be appointed in certain types of cases. (App. 14) Relying on that statute TDIC wrote "cut-off" letters to petitioner announcing it would not be responsible for his fees after the effective date of the letters.

B. **The Insureds Were Entitled To Independent Counsel**

Petitioner believed that under their contracts with TDIC his clients (three dentists) were entitled to his continuing representation to the end of their cases. For this reason he

continued as their counsel-of-record while TDIC's usually-selected defense counsel continued to represent the interests of TDIC which were in conflict with interests of petitioner's clients.

TDIC's lawyers were in conflict because charges against petitioner's clients included unlicensed practice in violation of health care licensing statutes and intentional acts for which California law forbids indemnification by an insurance company. If those cases were mismanaged to result in such outcomes TDIC would save money because they wouldn't have to pay people injured by the insured dentists.[9] The dentists would have to pay out of their own pockets.

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9 California law forbids insurance indemnification for injuries resulting from violations of the medical and dental practice acts. See California Insurance Code § 253 and California Code of Civil Procedure §1029.8. Willful torts are excluded from indemnification by California Insurance Code § 533 and by California Code of Civil Procedure 1668. See the willful acts discussion in Taylor v Superior Court (1970) 24 Cal.3d 890, 905 [157 Cal.Rptr. 693, 702 , 704] In an unguarded statement during the State Bar trial (at II 33:21-24) the State Bar judge said he recognized that there was a conflict-of-interest between petitioner's clients and TDIC's selected lawyers.

C. Two-And-A-Half Years Of Work Excluded From Evidence in the Civil Case

The original civil trial was totally unfair. In pretrial proceedings the California trial level court held that §2860 could properly impair the dentists' pre-existing contractual rights to "independent counsel" regardless of the conflicts,[10] and for that reason petitioner was forbidden to introduce evidence of 2 1/2 years of work he did after receiving TDIC's "cut-off" letters. (App. 14) At trial in that civil fraud case petitioner was also forbidden to adduce the customary evidence of the nature and purpose of the work permitted when lawyers and payers have a fee dispute. The trial judge repeatedly belittled petitioner before the jury, and TDIC's counsel was permitted the dishonest argument that petitioner did no work. Neither the California Supreme Court nor this court granted review.[11]

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10 The California Court of Appeal side-stepped that Art. I, § 10 federal constitutional issue by deciding there was no need for independent counsel because the conflicts were not proved by "clear and convincing" evidence which is not the standard ("a possible conflict") established by § 2860.

11 The State Bar Court and the State Bar Review Department mentioned this lack of review several times in justifying

D. No *Rest. Judgments 2d* § 29 "Unfairness" Review

Petitioner lodged a full clerk's and court reporter's transcript of the civil case with the State Bar Court and filed an extensive, sworn fact declaration as well as a lengthy legal memorandum which described the unfairness of the prior civil case in meticulous detail with copious citations to the record and published authority.

E. No Trial On Unique Licensure Issues Goes Beyond Preclusion

After giving preclusive effect to the Civil Judgment the State Bar Judge then made some new findings of fact adverse to petitioner on disputed issues in Count One which are only of significance on the arcane licensure issue of "propriety of his billing" (App. 16, 17, 19)[12] and to the level of discipline based on facts which the jury never resolved on the conflicting evidence because they were irrelevant in the civil case.

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their decisions (App. 14, 19), although both California law and Federal law hold that lack of discretionary review is not an expression upon the merits of the case.

12 The American Bar Association's model rules about fees are not as vague as the California "unconscionable fee" rules.

Nevertheless no defense was permitted in the State Bar to Count One, not even to the issues which the civil case jury didn't decide.

The State Bar Court trial level decision included half a dozen findings hurtful to petitioner on the issue of his worthiness to practice law for which there isn't a word of evidence in the record. The State Bar Review Department did not even comment on the invented facts or the dozen ignored published rules, statutes, and California Supreme Court precedents petitioner briefed. And it invented a few more hitherto unknown legal rules including a ruling suggesting that independent counsel is the third party payer's fiduciary (App. 23) which flies in the face of precedent, the California Rules of Professional Conduct Rule 4-101, 5-101, and 5-102 (former Rule 3-310(a)) (the conflict-of-interest rule), and former Rule 3-310(e) (the third party payer rule), as well as § 2860 that the relationship is arm's length because the independent lawyer is only in the case to protect the insureds from conflicts-of-interest imposed by the insurance company. See Assurance Co. of

America v Haven (1995) 32 Cal. App. 4th 1208 [49 Cal. Rptr. 25] rev. denied. Compare the fiduciary duty to the insureds *and* to the insurance company of insurer-selected counsel in the absence of independent counsel for the insured. See Purdy v Pac. Auto Ins. Co. 157 Cal. App. 3d 59 [203 Cal. Rptr. 574] (1984)

F. State Law Anarchy Invokes Federal Due Process Intervention

Petitioner recognizes that a state agency's changes in substantive law and procedure as well as refusal to observe the state's constitution are not federal issues. However, when no constitutionally-empowered due process mechanism is available to protect the licensee, the state's arbitrary taking of the liberty right and property in a law license violates federal standards. The state's long-term failure to follow its own constitution is strong evidence that there is no due process mechanism operating in California to protect law licenses.

Federal law steps in when an unconstitutional state policy impacts federal rights. See District of Columbia Court of

Appeals v Feldman 460 U.S. 462, 485 [103 S.Ct. 1303, 1316] (1983) to the effect that unconstitutional policies which regulate the practice of law are correctable in the district court.

CONCLUSION

California now follows a unique policy of allowing law licenses to be revoked without either a trial or plenary review in a constitutional court. Armed with that power the State Bar suspended petitioner's license, then it was revoked by a state Supreme Court order which acknowledges absence of adjudication in a constitutional court. Federal due process and equal protection rights were totally disregarded. The right to defend was abrogated because only a token period of time was allowed for "mitigation, while the burden of proof was shifted onto the petitioner and raised to "clear and convincing" evidence, in violation of the rules and a statute.

Taking property by violating the state Constitution and by dumping state statutes, rules, and precedents ordinarily is not a federal concern, but where the cumulative effect of multiple violations of state law and federal equal protection

and due process are abundantly demonstrated, the case crosses the state-federal jurisdictional threshold.

PRAYER

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Rudolph, Esq.

APPENDICES

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Appendix A

SO64786

SBC No. 92-O-11504, 92-O-14486 (Cons.)

IN THE SUPREME COURT OF CALIFORNIA

IN RE JEROME BERG ON DISCIPLINE

The appendix to the petition for writ of review is ordered stricken. The request for judicial notice is granted. Both the motion to augment the petition or for plenary consideration and the petition for writ of review are denied without prejudice to seeking reconsideration in the event the court determines in *In re Rose on Discipline*, S062859, that there is a right to plenary judicial review of recommendations for attorney discipline.

It is hereby ordered that Jerome Berg be disbarred from the practice of law and that his name be stricken from the roll of attorneys. He is also ordered to comply with rule 955, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the date this order is effective.* Costs are awarded to the State Bar pursuant to Business and Professions Code section 6086.10 payable in accordance with Business and

Professions Code section 6140.7, as amended effective January 1, 1997.

* See Business and Professions Code section 6126. subd. (c).

/S/ Chief Justice George

Appendix B

[Supreme Court filed April 22, 1998]

SO64786

IN THE SUPREME COURT OF CALIFORNIA

IN RE JEROME BERG ON DISCIPLINE

Petition for rehearing (petition for clarification of due process issues or reconsideration based on a new fact) is denied.

/S/ Chief Justice George

Appendix C

PUBLIC MATTER -- DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter Of	92-0-11504
JEROME BERG,	92-0-11486
A Member of the State Bar.	(Consolidated)
	OPINION AND ORDER
	ON REVIEW

I. INTRODUCTION

Respondent Jerome Berg has been charged with three counts of professional misconduct. Count one charged respondent with overbilling The Dentists Insurance Company (TDIC) while acting as Cumis counsel[1] for TDIC's insureds in 41 malpractice actions filed against dentists covered by TDIC malpractice insurance. Prior to the commencement of these

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[1] San Diego Federal Credit Union v. Cumis Ins. Society Inc. (1984) 162 Cal.App.3d 358 requires an insurer to pay for retained independent counsel for the defense of a lawsuit against the insured, where the insurer reserves the right to deny coverage at a later date when punitive damages are in

State Bar Court proceedings, TDIC filed a superior court action against respondent alleging causes of action for fraud and deceit, negligent misrepresentation, breach of oral contract, breach of the covenant of good faith and fair dealing, restitution, and money had and received. Following a 12-day trial, a jury awarded compensatory damages to TDIC in the sum of $282,024.86. In addition to entering judgment on the jury's award, the court awarded costs to TDIC.

In answer to three special interrogatories, the jury also found, by clear and convincing evidence, that respondent had acted with oppression, malice, and fraud. That judgment was affirmed in the Court of Appeal, and review was denied by the California Supreme Court and the United States Supreme Court.

In reference to his billing of TDIC (count one), respondent was found by the hearing judge to have committed dishonest acts in violation of Business and Professions Code section 6106,[2] prohibiting an attorney from committing an act

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[2] issue and the insurer denies coverage for punitive damages. References to section are to sections of the Business and Professions Code.

involving moral turpitude, dishonesty or corruption as well as a violation of rule 2-107 of the former Rules of Professional Conduct of the State Bar (effective January 1, 1975 to May 26, 1989),[3] (now rule 4-200 with some changes). That former rule prohibited charging or collecting an illegal or unconscionable fee.

Count two arises out of two separate engagement letters between respondent and Linda Reynolds Miller (Reynolds) and respondent's withdrawal of funds from his trust account that represented a portion of the settlement proceeds of the subject matter of the two engagement letters. In that count, respondent was found culpable of violating rule 4-100(A)(2), requiring an attorney not to withdraw trust funds for the attorney's use where the client disputes the attorney's right to take funds.

In count two the hearing judge determined that there was not clear and convincing evidence that respondent violated rule 4-100(B)(4) (requiring, on request, the prompt payment of monies the client is entitled to receive), section 6068, subdivision (c) (maintain only just actions), section 6068,

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[3] References to former rules refer to these former rules. References to rules refer to the current Rules of Professional Conduct effective May 27, 1989.

subdivision (g) (prohibiting an attorney from commencing or continuing a proceeding from corrupt motive), or section 6106 (prohibiting acts of moral turpitude, dishonesty).

In count three it was alleged that respondent's response to the State Bar's initial investigative inquiries in connection with count two was made with an intent to deceive, in violation of section 6106. The hearing judge found that there was a lack of clear and convincing evidence of such a violation.

Respondent has filed a 95-page opening brief, accompanied by an appendix containing 525 pages, which appear to be an amalgam of transcripts and documents filed in State Bar Court proceeding number 96-TE-04697, portions of transcripts, declarations, periodical articles and other material, some from the matter before us and some from the superior court action by TDIC. We rely solely on the record including the transcript of the proceedings in the hearing department in this proceeding in considering this review. We note that State Bar case number 96-TE-04697 is not before us, nor are the superior court proceedings, except as to those portions that were received into evidence in this proceeding by the hearing judge.

Respondent seeks review of all findings of culpability, but his briefs address the finding of culpability and discipline on count one almost exclusively. On the other hand, the State Bar seeks review of counts two and three, asserting that respondent violated rule 4-100(B)(4) and section 6106 by delaying six weeks in providing his client with her share of settlement proceeds. The State-Bar also seeks review of the determination that clear and convincing evidence of respondent's misrepresentations to the State Bar investigator in violation of section 6106 was lacking.

Following our independent review of the record, we affirm the hearing judge's determination as to culpability on count one. In count two we ma};e a finding under our duty of de novo review of a violation of rule 4-100(B)(4), but otherwise affirm the hearing judge's findings as to that count. We also affirm the findings as to count three and affirm the hearing judge's recommendation that respondent be disbarred.

II. CONTENTIONS OF PARTIES

Although presented in a multitude of forms in his briefs,

the primary issue raised by respondent in count one is the propriety of the preclusive effect given by the hearing judge to the superior court action by TDIC against respondent. Respondent further argues that: (1) the hearing judge was biased against him; (2) the charge against him under former rule 2-107 is unconstitutionally vague; (3) the hearing judge's limitation on his time to present a portion of his mitigation evidence relating to work done for TDIC after they terminated his right to compensation as Cumis counsel unduly restricted his right to present a defense to Count One; (4) the charges are barred by the statute of limitations; and (5) the State Bar used "secret" documents against him.

The State Bar supports the factual findings and conclusions of the hearing judge as to count one, but argues that there is clear and convincing evidence of a violation of rule 4-100(3)(4) and section 6106 in count two, and that respondent's misrepresentations to the State Bar investigator constitute an additional violation of section 6106 in count three.

We first consider the propriety in count one of giving preclusive effect to TDIC's superior court action against

respondent, and then deal with the balance of the arguments asserted.

III. DISCUSSION

A. Count one – Alleged False Billing

Respondent is charged with presenting false and misleading billing statements to TDIC between the period of March 1987 and May 1988. Commencing in November 1985, respondent was associated as Cumis counsel in some 41 malpractice actions against 4 dentists insured by TDIC. There was no written fee agreement between TDIC and respondent, but there was an oral agreement that respondent would be paid at a rate of $150 an hour for services rendered to the insured dentists.

For services purportedly rendered between March 1987 and the end of that year respondent was paid by TDIC the total sum of $357,024.86. The majority of these charges were billed at the rate of $150 an hour, a orally agreed, while a portion were billed at $175 an hour without either notice to TDIC or its agreement.

Respondent regularly billed TDIC for work before it was performed without either disclosing that fact to TDIC or obtaining its agreement. These bills, rendered monthly and separately on each of the 41 cases, reflected by date various services purportedly rendered, a description of the purported services, the time purportedly devoted to that service together with a total number of hours, multiplied by an hourly rate. The bills clearly represented that the indicated work had been performed. Respondent's bills were replete with descriptions such as "receipt of pleading," "records review," and "case preparation."

The record showed that on a large number of days respondent represented on bills that he personally worked in excess of 24 hours and that on a substantial number of days respondent represented he had personally worked in excess of 100 hours. This information was not discovered by TDIC until it did a complete audit of respondent's bills in 1988. Respondent identified his billing method as "bulk billing." Such a billing method was never agreed to by nor discussed with TDIC.

Respondent produced no time records, testifying that they had been destroyed within 90 to 180 days following each billing because TDIC had not complained. Respondent did not prepare pleadings in the malpractice cases other than one or two statements for settlement conferences. He prepared no memoranda, deposition summaries. written opinions, or other evidence reflecting productive work of the files in question. Respondent's files on these matters were disorganized and contained little in the way of evidence of client conferences. Respondent testified that he had an employee in his office count the number of pages of documents received pertaining to the TDIC matters and multiply that number by three minutes a page to determine his hours for billing purposes.

It was clear that many of the documents received were identical for each of the 41 cases, with the exception of the caption. Even so, they were each included in the scheme for determining time.

Upon the adoption of Civil Code section 2860, effective January 1, 1988, which section effectively amended the requirement that insurance companies provide Cumis counsel,

TDIC determined that it was no longer obligated to pay for or provide Cumis counsel to its insured dentists whom respondent was representing. After January 1, 1988, TDIC continued to receive bills from respondent, claiming that additional work had been performed prior to that date. By May 1988 TDIC stopped payment on those bills and following investigation determined that they had overpaid respondent some $250,000 based on bills representing work that had falsely been claimed to have been performed.

As indicated above, the bills were separately rendered monthly on the 41 separate files, and the fraudulent billing was not discovered until an audit of all of respondent's bills was completed.

These charges ultimately resulted in TDIC's successful action in the San Francisco Superior Court. That action included charges of fraud and deceit. In the superior court action, respondent cross-complained for the bills TDIC refused to pay and for other work allegedly performed after January 1, 1988. totaling $162,000. As to some issues raised by respondent's cross-complaint, the court granted TDIC's motion

for summary judgment. As indicated above, the jury returned a verdict against respondent on TDIC's claim in the sum of $286,024.86 and against respondent on the remaining issues in his cross-complaint.

In response to special interrogatories, the jury found, by clear and convincing evidence, that respondent acted with oppression, malice and fraud.

In an unpublished opinion, the First Appellate District Court of Appeal affirmed the judgment entered on the jury verdict in the superior court, as well as the order granting TDIC's motion for summary judgment. There, as here, respondent argued that he was entitled to be compensated for his work as Cumis counsel after the effective date of Civil Code section 2860. The appellate court affirmed the superior court determination that respondent was not entitled to such compensation from TDIC. The California Supreme Court and the United States Supreme Court denied review.

1. There was no error in giving the superior court judgment preclusive effect

In the superior court action, following a 12-day trial, the jury determined by clear and convincing evidence respondent was guilty of oppression, malice and fraud in his billings to TDIC for the period of March 1987 through May 17, 1988. In the disciplinary proceeding before us, respondent was charged with providing false and misleading billing statements to TDIC by representing work to have been personally performed that was not, in fact, performed, all covering the identical time period. In the superior court action, TDIC's claims manager testified that, following a full audit, he concluded that respondent had defrauded his employer through false billings by about $250,000.

As noted in the appellate court decision: "Litigation management expert, M. Brand Cooper, testified as to how attorneys generally keep track of time spent and bill their clients. At TDIC's request, Cooper had reviewed Berg's billings in this case. After describing that process and the reports it generated, Cooper testified that in his opinion Berg's billings

were 'unreasonable, excessive, dishonest and don't bear any relationship to the work that was actually expended. . . .' For reasons which he described in detail, he concluded that 'the overwhelming majority of the descriptions on the bills represent descriptions of work that was not performed.' Finally, he testified that appropriate compensation for the work Berg did as Cumis counsel was between $10,000 and $50,000."

Respondent urges error in the hearing judge denying him the right to re-litigate the propriety of his billing. We disagree. This court, in In the Matter of Applicant A (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 327-329, extensively analyzed the applicability of collateral estoppel, relying partially on Stolz v. Bank of America (1993) 15 Cal.App.4th 217, at 222, and concluded that in the appropriate case that doctrine is applicable to State Bar Court proceedings.

Under that analysis the initial inquiry in the issue preclusion known as collateral estoppel is whether or not the issues on which preclusion are sought were, in fact, litigated in the prior action.

The transcript in the prior action was introduced into

evidence in the State Bar Court proceedings, along with the verdict, evidence of the jury determination of oppression, malice and fraud, and the unpublished appellate court decision. Both our review of the record in the prior action and the appellate court opinion confirm that the issue of the false billing was fully litigated in the superior court action.

Respondent takes a contrary view. He argues his evidence in mitigation changes the issues before this court, claiming, among other things, that he later performed the work for which he billed. He points out that in the civil proceedings he was prohibited from presenting that evidence. Such an argument misses the point. The issue in both trials was the propriety of the billing. The fact, if true, that respondent harbored some intention to later perform the work that he represented in bills as having been completed has no bearing on culpability based on a charge of false billing under either section 6106 or former rule 2-107. The issues are identical to those before the jury on a question of fraudulent billing.

The fact that additional evidence may be admitted in the State Bar Court proceedings on the issue of discipline (i.e.,

evidence in mitigation and aggravation) has no effect on the issues before either the hearing judge or this court on the question of respondent's culpability on count one.

The second issue to consider in collateral estoppel is whether or not the civil determination was made under the same standard of proof as required in disciplinary matters before the State Bar Court or the California Supreme Court. (In the Matter of Applicant A, supra, 3 State Bar Ct. Rptr. at p. 329.) Rule 213, Rules of Procedure of the State Bar, title II, State Bar Court proceedings requires that the State Bar prove culpability in disciplinary matters "by clear and convincing evidence." In the San Francisco Superior Court action the jury determined "by clear and convincing evidence" that with regard to the facts of the case respondent acted with oppression, malice and fraud. There can be no question that the standards of proof in the two matters were identical.

The remaining issues in the determination of applicability of collateral estoppel in bar court proceedings are whether: (l) the party before this court was a party to the civil proceedings; (2) there was a final judgment on the merits in the

civil proceeding; and (3) it would be unfair to precluding relitigation of the issue or issues in question. (In the Matter of Applicant A, supra, 3 Cal. State Bar Ct. Rptr. at p. 329.)

It is clear that the defendant in the superior court action is the respondent now before us and that there was a final judgment in the prior action. On the third point, respondent asserts with great vigor that there is unfairness in prohibiting relitigation of the propriety of his billing because the proceedings in the San Francisco Superior Court were unfair, primarily for the reason that he was not permitted to show work he performed after he was notified that he would no longer be paid by TDIC, and that the superior courts' application of Civil Code section 2860 was unconstitutional. He further argues that the appellate court was incorrect in the analysis of the issues. In referring to that argument, the hearing judge put it: 'Tm not going to rule on whether you had a fair trial. I think the Court of Appeal did that." We agree and decline to deal with an issue that has been resolved before a California Court of Appeal and that the California Supreme Court and the United States Supreme Court have declined to review. However, we do note

that from a review of the entire record there is no unfairness by the State Bar Court in refusing respondent the right to re-litigate the propriety of his billing to TDIC.

In summary, we affirm the hearing judge's exercise of discretion in applying the issue preclusion in the matter before us.[4] We note that the United States Supreme Court has approved the exercise of discretion by the trial judge in such a situation. (Parklane Hosiery Co. Inc. v. Shore (1979) 439 U.S. 322, 331.)

2. Former rule 2-107 Was Not Unconstitutionally Vague

In his opening brief in a section entitled "vagueness," respondent cites cases raising the issue of lack of notice to one charged with disciplinable professional misconduct. He then

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[4] Although we hold that collateral estoppel was properly applied to preclude respondent from re-litigating the jury's finding that respondent's billing practices involved oppression, malice and fraud with respect to TDIC, we have independently determined that his fraudulent billing scheme is disciplinable under California law and the appropriate discipline to recommend as a result. The ultimate question in this proceeding is whether respondent should be disciplined, and if so, what the discipline should be. These are questions unique to the attorney discipline system; and are questions not determined by the application

appears to argue that former rule 2-107 fails to set forth standards for advanced billing. We agree that disciplinary rules must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." (Grayned v. City of Rockford (1972) 408 U.S. 104, 108.) However, such standards are explicitly set forth in former rule 2-107(B).

Although not clear, respondent appears to argue that he was doing "advance billing" with the intention of later performing the work and that former rule 2-107 does not specifically proscribe such "advance billings." Such a position must fail for the obvious reason that there was a clear representation in each bill sent to TDIC by respondent that the work had, in fact, been performed. Thus, bills were false on their face. Had TDIC agreed to "advanced billing" then the issue could be considered. No such evidence appears in the record. A witness for TDIC did testify, by way of example, that if .03 hours work billed on September 3 was, in fact, done on September 7, it would make no difference stating, "If he did the work he is entitled to payment." Such a statement is a far cry

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of collateral estoppel.

from approving payment of over $250,000 worth of work that had not been performed at the time of the billing when the bills represented that the work had been performed.

3. The Relationship Between Respondent and TDIC is Governed by Former Rule 2-107

Respondent argues that, since the dentists and not TDIC were his clients, he did not owe a high duty of loyalty to TDIC as suggested in the hearing judge's decision. We need not reach the issue of a formal description of the relationship between respondent and TDIC. It is enough to say that he owed the duty of honesty and integrity that lawyers owe to all persons. (Cf. Stanley v. State Bar (1990) 50 Cal.3d 555, 567; see also Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct. (standards), Std. 2.3.) In addition, TDIC, the insurance company for the dentists, stood in the shoes of the dentists. The obligation of TDIC to pay respondent arose out of their policies of insurance covering the dentists. The attorney-client relationship was with the dentists, not the insurance company, but the insurance company was obligated to pay no more than was reasonable

for the services rendered to the clients. Absent insurance, the client would have been obligated to pay for the services. To argue that an attorney does not owe the same duty regarding billing to a third person who has agreed to pay the reasonable attorney fees for the client as would be owed to the client, is to create a distinction without a difference. (Cf. Id.)

Former rule 2-107(A) stated: "A member of the State Bar shall not enter into an agreement for, charge or collect an illegal or unconscionable fee." That proscription is not limited to charges to the client, although obviously that would be the most common application. The term "client" is used only in setting forth some of the factors to be used in determining the reasonableness of the fees in former rule 2-107 (B). We determine that the proscriptions of former rule 2-107 apply with equal force to those cases, such as the present case, where a third party has assumed the obligation to pay the attorney's fees. However, we voice no opinion on the applicability of former rule 2-107 where a court awards fees according to agreement or statute to the prevailing party in litigation.

4. Respondent was not unduly restricted in presenting mitigation evidence

Respondent argues that he was prejudiced by the hearing judge limiting his time to present evidence in mitigation of the work that he performed after being notified by TDIC that they would no longer pay for his services allegedly rendered after January 1, 1988. We note that the court invited respondent to present in summary form the work he allegedly performed for which he was not paid. This resulted in exhibit N, a 26-page document that presents in summary form the work allegedly performed by respondent after January 1, 1988. The court received it in evidence even though the first 14 pages of that exhibit covered a period prior to the end of 1987. As counsel for respondent indicated, respondent was prepared to go forward with documents supporting each entry in exhibit N, but indicated that "going through all of the items which are summarized here in Exhibit N would probably take us a couple of weeks." Exhibit N was accepted into evidence and respondent was permitted, over the objection of the State Bar, to enter into a narrative covering some 30 pages of transcript on

that exhibit.

Respondent fails to accept that the evidence was admitted solely for purposes of mitigation, and continues to argue that the evidence goes to culpability. As we have discussed ante, we hold otherwise.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time . . . ." (See also 1 Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 298, pp. 268-270.) The sole purpose for considering the evidence in question was to show mitigation. The essence of the material was clearly set forth in the exhibit received in evidence covering the efforts respondent put forth after his compensation had been terminated. We further note that the mitigating effect of those efforts is lessened by respondent's testimony that when he performed those services he expected to be compensated for them. We find a commendable exercise of discretion by the hearing judge.

5. The charges are not time barred

Respondent argues that an action based on fraud is barred unless proceedings are commenced within three years of discovery, citing Code of Civil Procedure section 338, subdivision (d). At the time this matter arose, the rules concerning disciplinary matters had no limitation period. (See Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 51(h) [new rule on limitations effective only on complaints and reports received by the State Bar after July 1, 1995].) Therefore, the mere lapse of time in the filing of a disciplinary complaint is no defense absent a showing of specific prejudice. (Yokozeki v. State Bar (1974) 11 Cal.3d 436, 449.) No such showing has been made.

6. The state Bar did not use "secret papers" against respondent

Respondent argues that he was refused access to the briefs filed by the parties in In the Matter of Applicant A, supra, 3 Cal. State Bar Ct. Rptr. 318. That was a moral character proceeding, which are confidential and not public under section 6060.2. As recited in that opinion, the applicant

waived confidentiality only as to the decision that was published. Respondent asserts that the State Bar had access to these briefs, and that he was denied such access. While such an assertion is not supported by the record, assuming it to be true, it entitles respondent to no relief. The situation is no different than any prosecuting agency or private law office that may have internally available prior research on an issue addressed in a published opinion similar to that at hand. Respondent cites us to no authority suggesting that the "use," if any, of such material is improper. The argument is devoid of merit.

B. Count Two – Handling of the Proceeds of the Reynolds Settlement

Reynolds engaged respondent to represent her in two separate automobile accident cases involving personal injury to Reynolds. In the earlier case, an engagement letter dated September 7, 1989, provided that the attorney's fees would be one-third of the recovery if the case settled before a trial setting conference and forty percent if it settled thereafter. In the later case, an engagement letter effective January 12, 1990, stated that the fees would be forty percent of the net recovery. Since

the defendants in the two cases were insured by the same insurance carrier, the cases were consolidated.

The two cases were arbitrated and no trial-setting conference was held, resulting of an award of $18,500. Thereafter, respondent was able to negotiate a settlement in the total sum of $27,500, which was not allocated between the two cases. Respondent calculated his fee at forty percent of the total recovery, amounting to $10,571.24 and set that forth on a settlement statement. Reynolds signed that statement containing the forty percent allocation to attorney's fees on June 25, 1991. However, on June 26 she wrote respondent objecting to his taking forty percent on both matters when the earlier agreement called for but one-third. That letter was received in respondent's office on June 28.

On June 28, 1991, respondent issued to himself a check drawn on his client trust account in the sum of $3,571.24, and on July 10, 1991, he issued a second check on the same account to himself for what he claimed as the balance of his fees in the sum of $7,000, which represented a total of forty percent of the $27,500 recovery. Respondent testified that he was unaware of

Reynolds's letter of June 26 and first became aware of a fee dispute as the result of a letter from Reynolds dated July 23, 1991. In the July 23 letter Reynolds reiterated her position and demanded payment of her portion of the proceeds.

Following receipt of the July 23 letter, respondent sent a revised settlement statement suggesting that Reynolds sign it under protest, that respondent would deliver the uncontested portion to Reynolds, and that "we can work on resolving the disputed portion." Although it was mentioned in the engagement letters, respondent did not suggest that the fee dispute be arbitrated by the local bar association. (See, generally, § 6200 [arbitration of attorney's fees].) On August 2 Reynolds signed the revised statement reiterating her position. On August 6, respondent sent to Reynolds the undisputed portion of $15,274.37.

Three days later Reynolds filed a small claims action against respondent for the disputed amount of fees, and respondent countered with a municipal court complaint alleging that her failure to cooperate as a client had cost him a much larger fee. Following a judgment in favor of Reynolds,

respondent filed a notice of appeal, but the appeal was dismissed when respondent failed to deposit fees. That judgment was satisfied.

1. The payment of fees to respondent and proceeds to Reynolds

The hearing judge determined that respondent was culpable of a violation of rule 4-100(A)(2), requiring that when an attorney's right to a portion of trust funds is disputed by a client, the dispute must be resolved before the disputed portion may be withdrawn by the attorney. On the other hand, the hearing judge determined an absence of clear and convincing evidence that respondent violated rule 4-100(B)(4), requiring, on request, prompt payment by an attorney of monies the client is entitled to receive or that he violated § 6106 (proscribing acts involving moral turpitude, dishonesty).

Reynolds's letter of June 26, 1991, was admittedly received by respondent's office on June 28. In that letter Reynolds disputed respondent's right to the total fees he claimed and further stated that she expected a check for the full amount she claimed due her. Respondent testified that he

did not see that letter and was not aware of its contents until long after he took his fees.

As the hearing judge points out, even if this is true, respondent failed to provide any evidence of a return to trust of the disputed portion of the fees, even after admittedly being put on notice of the dispute. We agree with the hearing judge's determination that respondent is culpable of violating rule 4100(A)(2), because he did not return the disputed portion to his client trust account pending the dispute's resolution, (In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 758) and in taking disputed fees out of trust.

The charge of violation of rule 4-100(B)(4) presents a more involved question. It is fundamental that respondent had no more right to his fees than did the client to her share of the settlement proceeds. The question is whether we charge respondent with knowledge of Reynolds's June 26, 1991, letter that was in his office at the time of his withdrawal of the balance of his claimed fees.

In the normal course of the operation of a law office an attorney should not be at risk of discipline for the failure to

have knowledge of every item of information that comes to the office. (Palomo v. State Bar (1984) 36 Cal.3d 785, 795-796; In the Matter of Respondent E (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 726.) Here, however, the attorney took action regarding trust funds in which a client had an ownership interest, to the detriment of the client and to his advantage, without considering the information that the client had, in fact, provided him. There is no explanation in the record for respondent taking a portion of the settlement proceeds without simultaneously providing to the client her portion of those proceeds. There is nothing that suggests that respondent was entitled to some priority in the disbursement of the settlement proceeds of client's matters.

We agree with the hearing judge that a six week delay in the disbursement of proceeds of a settlement would not, per se, result in a violation of rule 4-100(B)(4). However, when an attorney disburses his or her portion of client's settlement proceeds for the account of the attorney and thereafter delays in disbursing the client's portion of such proceeds for a material period of time without compelling reason, serious concerns as

to whether such a violation has occurred are raised.

Respondent was working with the subject matter of the June 26 letter from the client; it was a matter in which he owed the highest duty to the client to act fairly, and he was obligated to review the file and other information sent him by the client, including her demand for payment. Under the circumstances of this case, we do charge respondent with the knowledge of the information the client had provided to him.

In the face of that demand, combined with the fact that respondent made disbursements to himself, and absent good reason for holding the funds, we conclude contrary to the hearing judge that respondent's failure to make disbursement to the client for a period of six weeks constitutes a wilful violation of rule 4100(B)(4). However, like the hearing judge, we do not conclude that respondent's failure involved moral turpitude in violation of section 6106.

2. The filing of a civil action against Reynolds

In count two respondent is also charged with violation of section 6068, subdivision (c) requiring an attorney to maintain only such actions as appear just. In addition, he is

charged with commencing or continuing an action from corrupt motive of passion or interest in violation of section 6068, subdivision (g). The object of these charges is the municipal court action respondent filed against Reynolds in response to her small claims filing.

We agree with the hearing judge that there is no clear and convincing evidence of the motivation behind respondent's actions in filing such a response to the small claims action. However, respondent's conduct does raise questions about his motivation. He did not suggest that the dispute could be resolved through arbitration with the local bar association, even though it was in the fee agreements In addition, the dispute was clearly within the jurisdiction of the small claims court. However, as indicated by the trial court, respondent's conduct was within his legal rights. We conclude there is an absence of clear and convincing evidence that respondent acted from a corrupt motive in violation of section 6068, subdivision (g). Likewise, we conclude that there is no clear and convincing evidence that the action was unjust in violation of section 6068, subdivision (c).

C. Count Three -- Respondents representations to the State Bar regarding the Reynolds charges

In September 1992, a State Bar investigator wrote respondent inquiring about the Reynolds matter. On October 2, 1992, respondent wrote, replying that Reynolds objected to the fee for the first time on August 2, 1992, and that when he withdrew his fees there was no fee dispute. The State Bar alleges these statements were false and made with the intent to deceive, involve moral turpitude, and, therefore, violate section 6106.

The hearing judge points out that it is plausible that in his October letter to the State Bar respondent may have confused the time he received information that Reynolds disputed the fee. Even though controverted, respondent's version supports a reasonable inference of absence of misconduct, which the hearing judge was free to find. (See, generally, Davidson v. State Bar (1976) 17 Cal.3d 570, 573-574.) Even though we have charged respondent with knowledge of Reynolds's June 26 demand for payment for purposes of rule 4-100(B)(4), we do not attribute that knowledge to him for

moral turpitude purposes under section 6106. Resolving reasonable doubt in favor of respondent (Vaughn v. State Bar (1972) 6 Cal.3d 847, 852), we agree that the State Bar has not shown a violation of section 6106 by clear and convincing evidence.

D. Alleged Bias By the Hearing Judge

With respect to his contentions regarding bias of the hearing judge, we note initially that respondent has failed or refused to support them with cites to the transcript by page and line, nor has he identified any exhibits by the number or letter of the exhibit and page of the exhibit, but only by reference to the massive appendix he has prepared. As we noted earlier, that appendix contains reference to material that is not properly before us. As a consequence, respondent has failed to comply with rule 302 (a) of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings and waived any error. (Cf . rule 15 (a), Cal. Rules of Court; 9 Witkin, Cal. Procedure, (3d. ed. 1985) Appeal, § 475, pp. 467-468.) Nonetheless, we have exercised our discretion and searched and located the relevant portions of the record in the

furtherance of justice.

Respondent takes exception to the hearing judge's observation in the decision that, when respondent was asked about his state of mind and the nature and quantity of the work he actually performed he rambled, related anecdotes, and gave details of underlying malpractice cases. We have reviewed the record and confirmed that respondent repeatedly used a question as a platform to initiate a description of material that may or may not have been related to the question asked and regularly exceeded the bounds of the question without fully answering it. In spite of repeated reminders by both the court and his own counsel, this conduct continued throughout the trial. The identical conduct was noted by the appellate court in the civil trial. Even the examples cited by respondent as providing direct responses to questions from the court show that respondent exceeded the bounds of the questions in giving his answers.

A reading of the record demonstrates that the hearing judge took an evenhanded approach to attempting to obtain from a difficult witness the information essential to reaching a

just decision in this matter. The record reflects an unfortunate determination on the part of respondent to describe events in his own way, regardless of the specific questions put to him. We find no indication of bias on the part of the hearing judge. In fact, we laud the hearing judge's effort to set forth the factors he relied on in making his credibility determinations. (See In the Matter of Wright (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 227 [court should declare how it weighed the evidence and determined the credibility of the parties and witnesses]; see also Evid. Code, § 780, subd. (c) [in making credibility determinations, finder of fact may consider the extent of the witness's capacity to perceive, recollect, and communicate the matter about which he testifies].)

IV. DISCIPLINE

A. Mitigating Circumstances

We have reviewed the hearing judge's determinations of mitigation and agree. Respondent testified that he did some pro bono immigration cases in the 1960's, that he was a trustee at his temple and assisted in the acquisition of land for the

temple in the 1970's, and that he did some pro bono work for a doctor and a professor and for the Union of Physicians by preparing its bylaws in the 1980's. In 1989 he suffered a heart attack that severely limited his activities for a period of approximately six months. In the 1990's he worked on a social security case and an unemployment case, as well as writing an amicus brief for the Union of Physician and served as a consultant to the Union of Physicians, all pro bono. We give minimal mitigating credit to such pro bono work.

Respondent sought to show, by way of mitigation, that he devoted an enormous amount of time to TDIC matter for which he was not paid and urged that as mitigation. However, respondent admits that he expected to be paid for those hours even though TDIC initially refused to do so. In addition, respondent produced no billings, time records or work-product that substantiates his claim. Respondent sought compensation for that time in his cross-complaint against TDIC in the superior court. That claim was denied. There is no clear and convincing evidence that the work was ever performed, and if performed, it was in the expectation of being compensated.

Thus, we find no basis for mitigation in the scenario recited concerning the alleged work for which respondent sought compensation from TDIC.

In summary, there is no showing by clear and convincing evidence that demonstrates that the public, courts, and legal profession would be adequately protected by reduced discipline, pursuant to standard 1.2(e).

B. Aggravating Circumstances

Respondent has a prior record of discipline. On January 24, L986, respondent was privately reproved for one count of client abandonment that occurred over the period from 1981 through 1983. Standard 1.2(b)(i) suggests that a prior record of discipline demonstrates a need for a greater degree of disciple than otherwise might be warranted.

There were multiple fraudulent monthly bills in the TDIC matter, each representing one of the 41 cases on which respondent was Cumis counsel. Respondent was found to have billed throughout 1987 and well into 1988 for services that had not, in fact, been performed. The fraudulent bills stopped only when TDIC commenced its audit of respondent's charges and

refused further payment. Standard 1.2(b)(ii) indicates that multiple acts or a pattern of misconduct is an aggravating circumstance.

We determine that the multiple fraudulent billings, representing numerous monthly bills, covering a continuous period of in excess of 10 months, constitutes a pattern of misconduct.

As the hearing judge noted: "Respondent's unconscionable fees and deliberate misrepresentations to TDIC over an extended period of time clearly established his culpability of multiple instances of serious misconduct, all of which involved moral turpitude. 'Such dishonest conduct is inimical to both the high ethical standards of honesty and integrity required of member of the legal profession and to promoting confidence in the trustworthiness of members of the profession.' (Stanley v. State Bar, supra, 50 Cal.3d 555, 567.)"

Throughout the proceedings in the superior court, Court of Appeals, and even through argument to this court, respondent has refused to acknowledge any misconduct in his billing. It has been determined that he repeatedly fraudulently

billed TDIC. That determination has been affirmed on appeal, and respondent's basic response is that the decision is in error. In spite of the finality of that determination, respondent devotes some 80 pages of his brief in arguments that miss the point of the fact that a final determination has been made of his fraudulent misconduct. As did the hearing judge, we quote from In re Morse (1995) 11 Cal.4th 184, 209: "Of course, [respondent], like any attorney accused of misconduct, had the right to defend himself vigorously. [Respondent's] conduct, however, reflects a seeming unwillingness even to consider the appropriateness of his statutory interpretation or to acknowledge that at some point his position was meritless or even wrong to any extent. Put simply, [respondent] went beyond tenacity to truculence."

Put another way, respondent's "defense did not rest on a good faith belief that the charges were unfounded, but on a blanket refusal to acknowledge the wrongfulness of conceded conduct (citation.)" (Carter v. State Bar (1988) 44 Cal.3d 1091, 1101.) This applies to both the TDIC matter, which we have determined involves moral turpitude, and the trust account

violations concerning his client Reynolds. Respondent's lack of insight into the wrongfulness of his actions is an aggravating factor. (Id. at pp. 1100-1101.)

C. Appropriate Level of Discipline

We look for like cases to assist in the determination of the appropriate discipline. In Cannon v. State Bar (1990) 51 Cal.3d 1103, the Supreme Court determined that there was an absence of a pattern of willful failure to perform services, but concluded that disbarment was appropriate because of the existence of multiple instances of serious misconduct.

In Dixon v. State Bar (1985) 39 Cal.3d 335, respondent was culpable of moral turpitude, attempting to charge an unconscionable fee, failing to maintain a record of client funds and account for them, and failing to refund fees paid in advance and not expended on the client's behalf. There the court pointed out: "Moreover, as in the previous proceedings, petitioner has been firm in his refusal to admit wrongdoing or to show remorse. He continues to assert, albeit based on shifting descriptions of the facts, that his conduct was appropriate and he owes no refund to his clients." (Id. at pp. 343-344.) Dixon

had a prior suspension and was disbarred.

In the instant case, respondent has shown no remorse and has continuously asserted the propriety of his conduct even though it has been determined to have been fraudulent. This denotes an unwillingness to accept the judicial process, even aside from the disciplinary process. It suggests that, for respondent, the sole interpretation of the Rules of Professional Conduct and the State Bar Act is his own.

We take the repeated fraudulent billing, involving moral turpitude, to be a matter from which the public deserves substantial protection. When this misconduct is combined with the misconduct found in the Reynolds matter, consisting of not promptly paying over proceeds to a client and not retaining disputed fees in a trust account, and respondent's inability or unwillingness to accept the judicial process, it places the public, the courts, and the profession at risk. In the judgment of this court, nothing less than disbarment will appropriately control this risk.

V. ORDER

Respondent has been involuntarily enrolled as an

inactive member of the State Bar under section 6007 subdivision (C)(4) in State Bar Court proceeding 96-TE-04697 and will remain so absent further order. Nonetheless, we consider the application of section 6007, subdivision (C)(4) (as amended effective January 1, 1997) mandatory. We order that respondent be involuntarily enrolled as an inactive member of the State Bar in accordance with section 6007, subdivision (c)(4), effective 15 days after service by mail of this order on respondent.

V. RECOMMENDATION

We recommend that respondent be disbarred. We further recommend that respondent be ordered to comply with the requirements of rule 955 of the California Rules of court within 30 days after the effective date of the Supreme Court order in this matter and file the affidavit provided for in paragraph (c) of that rule within 40 days after the effective date of the order, showing his compliance with that order.

In addition, we recommend that costs be awarded to the State Bar in accordance with section 6086.10 of the Business and Professions Code and that such costs be payable

in accordance with Business and Professions Code section 6140.7 (as amended effective January 1, 1997.)

Obrien, P.J.

We concur:

Norian, J.

Stovitz, J.

Appendix D

Title 13.5

OBLIGATION TO DEFEND ACTION

Section

2860. Conflict of interest; duty to provide independent counsel; waiver; qualifications of independent counsel; fees- disclosure of information.

2861 to 2866. Repealed.

Title 13.5 was added by Stats.1987, c. 1498, § 4.

§ 2860. Conflict of interest; duty to provide Independent counsel; waiver; qualifications of independent counsel; fees; disclosure of information

(a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

(b) For purposes of this section, a conflict of interest

does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

(c) When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

(d) When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

(e) The insured may waive its right to select independent counsel by signing the following statement: "I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit."

(f) Where the insured selects independent counsel pursuant to the provisions of this section, both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation. Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract. (Added by Stats.1987, c. 1498, § 4. Amended by Stats.1988, c. 1114, § 1.)

Appendix E

ORDER

IN RE MASON HARRY ROSE V

ON DISCIPLINE

No. S062859

California Supreme Court

Filed December 10, 1997

The State Bar of California is ordered to cause why the Supreme Court should not issue a writ of review and accord this proceeding plenary consideration notwithstanding its determination that no issue raised warrants consideration under California Rules of Court, Rule 954(a). The return to the order to show cause shall be served and filed by January 9, 1998. Briefing should address both whether there is a constitutional requirement for plenary consideration and the criteria the court may use in determining whether plenary review should be accorded.

George, Chief Justice
Mosk, Associate Justice
Kennard, Associate Justice
Chin, Associate Justice
Brown, Associate Justice

Appendix F

STATE BAR COURT

STATE BAR OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In re the Matter of	Case No. 92-0-11504 EEB
JEROME BERG, No. 28842	CORRECTED ORDER
A Member of the State Bar.	SUMMARIZING STATUS
_____/	CONFERENCE

A status conference was conducted on May 19, 1995, to define and narrow the issues presented in this case as part of an effort to narrow the discovery that will be conducted. Attending the status conference were Deputy Trial Counsel Andrea Wachter, Respondent's counsel, Robert Rudolph, and Respondent.

As a result of the status conference, I have determined that it is and will be undisputed that Respondent utilized a "bulk billing" system under which he determined the fees he charged to TDIC by using a formula that calculated the fees based on the quantity of pleadings and documents he received.

This resulted in TDIC being billed for services which were not performed at the time of the billing. The State Bar alleges that this billing system resulted in misleading bills to TDIC and caused TDIC to pay unconscionable fees to Respondent.

Additionally, it is undisputed that in January 1988, TDIC notified Respondent that pursuant to Civil Code section 2860, TDIC would no longer pay for Respondent's services. Respondent contends that he continued rendering legal services to the dentists insured by TDIC whom he had been hired to represent. The state Bar disputes this contention.

As a result of the discussions at the status conference, I see the following legal and factual issues in this case:

> Was TDIC aware of Respondent's "bulk" billing method? Did TDIC agree to this method of billing? Were the fees charged using this "bulk" billing method unconscionable when they were billed?
> If at some point in time, Respondent did perform all the hours of work he billed for using his "bulk" billing method, was the fee unconscionable?
> Since Respondent's clients were not TDIC, but rather the dentists that TDIC insured, could TDIC terminate their financial responsibility for Respondent's fees after 1 January 1998 in light of TDIC's alleged obligation to provide independent counsel to the dentists.?
> If TDIC was not financially liable for Respondent's fees after January 1988, what was the extent of the services that Respondent rendered up to that point

in time?
How much work did Respondent perform on behalf of TDIC's insureds?

It was apparent from the discussion that the extent of the services Respondent provided to the dentists will be relevant in this proceeding, at least on the issue of mitigation. To try to reduce the amount of discovery that will be conducted and the amount of trial time needed, Respondent will prepare some draft factual background stipulations relating to the TDIC cases Respondent worked on and the extent of the work her performed. Respondent will submit those stipulations to the Deputy Trial Counsel who will review them with TDIC to see if she can agree to any of the stipulations. This must be completed prior to the next status conference.

The parties will submit simultaneous briefs on the issues of whether Respondent's billing practice which resulted in billing for work before it was performed constituted the charging of an unconscionable fee. Additionally, the parties will submit briefs on the issue of whether the fee is unconscionable if at a future date, the hours bill and paid for have been worked.

Their briefs must be filed by June 23, 1995. Simultaneous responses must be filed by July 7, 1995. An appearance status conference will be conducted on July 21, 1995, at 10:30 a.m. to discuss discovery issues.

Dated: May 25, 1995

/s/_____

Jennifer Gee

Judge of the State Bar Court

Appendix G

April 24, 1998

John Rossi,
Assistant Clerk of the Court
Supreme Court of California
303 Second Street
South Tower, Eighth Floor
San Francisco, CA 94107

Re: Matter of Jerome Berg
Your No. S064786

Dear Mr. Rossi,

At the suggestion of a clerk of your court I write to ask for your help.

In the captioned matter my client was forbidden to defend himself fully in a civil case charging fraud. Two-and-a-half years of his work was excluded from evidence. If admitted into evidence that work proves no damages were incurred. Thus, fraud could not be established because damages are a required factor in a fraud case.

Contrary to published law (In the Matter of Applicant

A (State Bar Review Department 1995) 3 Cal. St. Bar Ct. Rptr. 318) the State Bar Court did not conduct an "unfairness" review before giving that old judgment preclusive effect. Based on that unfair fraud judgment disbarment was recommended, and this court did not provide plenary review.

I am drafting a petition for certiorari to be filed in the United States Supreme Court. One issue to be raised there is this court's current policy of not conducting plenary review. To complete my research, we asked your colleague if there is any rule, written policy statement, press release, or any other publication of this court in which it expresses its current policy of not giving plenary review to cases in which serious violations of federal due process rights are carefully addressed in a well-researched and competently cited, timely Petition for Review. She said she knew of no such publication, policy resolution, rule, or press release.

Can you verify that there is no such document which I can present to the high court? If there is such a document, may I have a copy to be used as an Appendix to the high court petition?

I enclose a self-addressed stamped envelope and a check in a sum not to exceed $20 to expedite receipt of your response and to pay for a copy of the publication describing the adoption of the policy which denies plenary review.

Because my petition to the high court is due 90 days after this court's last order I would appreciate a prompt reply.

Very truly yours,

Robert Rudolph, Esq.

RR/rm
SASE
Check

Appendix H

Supreme Court of California

[SEAL]

John C. Rossi
Assistant Clerk-Administrator
San Francisco

Robert D. Barrow
Chief Deputy
Los Angeles

Brian Clearwater
Calendar Coordinator
San Francisco

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

April 28, 1998

Mr. Robert J. Rudolph
Attorney at Law
1255 Post Street, Suite 606
San Francisco, CA 94109

Re: SO64786 - In Re The Matter Of Jerome Berg

Dear Mr. Rudolph:

In response to your letter of April 24, 1998, this office does not provide research. Returned is your check not to exceed twenty dollars.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

/s/
By: John C. Rossi
Assistant Clerk-Administrator